BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT CHARLES BARRETT Claimant VS. **ALL PARTS AUTO SALVAGE** Respondent AND **UNINSURED** Insurance Carrier AND/OR **WORKERS' COMPENSATION FUND**	)	Docket No. 1,023,182

ORDER

Claimant requests review of the July 20, 2005 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The initial issue raised at the preliminary hearing was whether the parties are covered by the Kansas Workers Compensation Act (Act) because it was alleged respondent did not have the requisite annual payroll of more than $20,000.

The Administrative Law Judge (ALJ) determined the claimant did not sustain his burden of proof to establish that respondent had a sufficient annual payroll to be covered by the Act.

The claimant requests review of whether respondent's annual payroll was enough to mandate coverage under the Act.

Respondent argues the claimant was terminated in April 2005 which reduces respondent's expected payroll for 2005 and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.[1] Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in the Act.[2] K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

> (2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

In order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute establishes a two-prong test. First, the employer must not have had an annual payroll for the preceding calendar year greater than $20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than $20,000 for all employees excluding family members as of the date of accident.[3]

Claimant began working for respondent in February 2005 and was paid $400 per week. His duties included pulling parts off of vehicles and cleaning the yard. He was injured on February 15, 2005, and his employment was terminated on April 5, 2005. Darrell D. Rankin, respondent's co-owner, testified that if claimant had not been terminated he would have possibly worked the remainder of the year but that he had been told he would work as business dictated and there would possibly be days or weeks off work. This is corroborated by the fact that after claimant's employment was terminated it was several

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[1] *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

[2] *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

[3] *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

weeks before it was necessary to hire someone to replace him. Laurie Boelk, respondent's co-owner, testified that at any given time there is only one employee and the employee would not get paid for holidays during the year. She further presented an exhibit which detailed what the employees had been paid and a projection of what the employee would be paid during 2005. The total on that document reflected an anticipated total payroll of $17,212.63.[4] But that document reflected a projection of salaries paid and to be paid after the date of accident. The significant date is whether, immediately before claimant's accident, respondent could have reasonably estimated that it would not have a total gross annual payroll for 2005 of more than $20,000.[5]

Claimant argues that the employee claimant was hired to replace earned $1700 in January. From February to the end of the year claimant would have earned $400 a week. Multiplying that figure by 48 results in the sum of $19,200. Adding the $1700 paid claimant's predecessor results in the sum of $20,900 which is more than the requisite $20,000 payroll. But neither claimant nor his predecessor was expected to work the entire year as it was anticipated there would be days or weeks when business would dictate that there was no work. Moreover, there would be time off for holidays for which an employee would not be paid. Thus, there was uncertainty regarding how many weeks claimant would have actually been compensated. The simple multiplication argued by claimant does not take into account the variables testified to by respondent's owners. The Board concludes the inferences suggested by claimant cannot realistically and rationally be drawn from the evidence.

Based upon the evidence compiled to date, the claimant has failed to meet his burden of proof that respondent had a payroll exceeding $20,000 in 2004 or could reasonably estimate such a payroll in 2005. The Board affirms the ALJ's determination that the claimant did not sustain his burden of proof to establish that respondent had a sufficient annual payroll to be covered by the Act.

As provided by the Act, preliminary hearing findings are not final but subject to modification either upon presenting additional evidence at another preliminary hearing or upon a full hearing on the claim.[6]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated July 20, 2005, is affirmed.

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[4] P.H. Trans., Resp. Ex. 1.

[5] *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

[6] See K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this 31st day of October 2005.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
Christopher J. McCurdy, Attorney for Fund
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director